IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JEFFREY PROBST, a class of similarly situated individuals, Plaintiff/Respondent, VIRAG HEGYI and ATTILA HEGYI, members of a class of similarly situated individuals, Objectors/Appellants, v. STATE OF WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.	No. 38094-3-II UNPUBLISHED OPINION

Penoyar, J. — Virag Hegyi[1] appeals the trial court's order approving a class action settlement agreement between the Department of Retirement Systems (Department) and a class of public employees. Hegyi's arguments are without merit and we affirm.

FACTS

I. Background

In September 2003, Jeffrey Probst,[2] a member of the Public Employees' Retirement System (PERS), filed an administrative review petition with the Department. In his petition,

[1] Hegyi, acting pro se, appeals the trial court's order through her father and court-appointed guardian, Attila Hegyi.

[2] Probst states that he agrees with the Department's assertion that we should reject and dismiss Hegyi's appeal.

Probst claimed that he and a class of similarly situated PERS members were entitled to more interest on their mandatory employee contributions than they had received upon transfer from PERS Plan 2 to PERS Plan 3.[3] The Department denied Probst's petition.

In August 2004, Probst filed an administrative appeal with the Department's presiding officer, seeking relief on his own behalf and on behalf of a class of similarly situated individuals. The presiding officer determined that class-wide relief was not available and that Probst could only pursue his individual claims. Probst and the Department subsequently filed cross motions for summary judgment. The presiding officer denied Probst's motion, granted the Department's motion, and dismissed Probst's claims.

On January 20, 2005, Probst filed a class action in Thurston County Superior Court, claiming that he and a class of similarly situated members were entitled to additional interest on their mandatory retirement contributions upon transfer between, or withdrawal from, State retirement plans.[4] On October 24, 2005, Probst filed a judicial review action appealing the decision of the Department's presiding officer. On March 17, 2006, the trial court consolidated Probst's actions.

[3] According to Probst, the Department promised to pay interest at a rate of 5.5% on the accounts of PERS Plan 2 members upon transfer to PERS Plan 3; however, it "denied all interest in the quarter of the transfers and denied interest on deposits in the quarter of each deposit" in violation of chapters 41.04, 41.40 and 41.50 RCW and the common law. Resp't's Br. (Probst) at 3.

[4] Probst filed the class action before the presiding officer issued his decision in the fall of 2005.

On June 30, 2006, the trial court entered an order certifying the class under CR 23(b)(1) and (2). The class consisted of all PERS members who transferred from PERS Plan 2 to PERS Plan 3.[5] The trial court appointed Probst as the class representative.

II. Settlement Agreement

The trial court subsequently ordered the parties to participate in settlement discussions. The parties entered into settlement discussions with the guidance of an experienced mediator. After hearing the parties' respective positions and arguments, the mediator ultimately recommended to both parties that a $5.5 million payment to the class was a reasonable compromise. In order to avoid the uncertainty, risks, delays, burdens, and costs of further litigation, the parties agreed to the settlement agreement.[6]

Under the agreement, the settlement class will receive $5.5 million. The net amount distributed to the settlement class will equal the amount remaining after the deduction of a class representative award and an attorney fee award to class counsel. The agreement provides for a $7,500 payment to Probst for his participation as class representative from 2003 through 2007. Certain criteria determine whether a class member is a "qualified" class member and thus entitled to money under the agreement. Clerk's Papers (CP) at 83. The class members who are no longer

[5] The trial court's certification order did not decide any issues related to Teachers Retirement System (TRS) members who transferred from TRS Plan 2 to TRS Plan 3. Instead, the order stated that TRS members "may be included after further briefing and further order of the Court" and that it "adopted [the class definition] without prejudice to any requests by plaintiffs to expand the class." Clerk's Papers (CP) at 82.

[6] The settlement does not resolve pending claims of TRS members who transferred prior to January 20, 2002. It does, however, ensure that it does "not negatively impact those non-settling TRS claims though a number of procedural protections." CP at 83.

active in the retirement system were required to submit a claim form by a specific deadline in order to ensure their identity and location. The claim form provided these class members an opportunity to receive a direct payment or roll the amount over into another eligible retirement plan. Individuals with estimated claims of less than $15 are not eligible for recovery.

The individual recovery amount will be determined on a pro rata basis that is based on the amount each individual transferred or withdrew from his/her retirement account. Under this formula, the class members who transferred or withdrew larger monetary amounts from their retirement accounts will receive a larger share of the monetary recovery than those who transferred or withdrew smaller amounts from their retirement accounts.

III. Trial Court's Approval of Settlement Agreement

On December 14, 2007, the trial court held a hearing on the plaintiffs' motion for preliminary approval of the proposed settlement agreement. At the conclusion of the hearing, the trial court entered a preliminary approval order, which approved the form of the class notice and the method of providing notice to the settlement class, set deadlines for the filing of objections, and set the final settlement hearing date.

On March 10, 2008, Hegyi, a member of the settlement class, objected to the settlement agreement and to the trial court's preliminary approval order. Hegyi appears to have objected to the following: (1) the trial court's preliminary order and class action notice contained inconsistent information; (2) the notice statement regarding the class members' rights under the settlement agreement was incomplete, misleading, and might be untrue*;* and (3) the class members' rights "might be governed by the U.S. Constitution, Federal and State Laws, State and Court Rules,

[and] outstanding Court Orders" even though the trial court's preliminary order stated that "Class Member[s] shall be bound by the terms of the Settlement [A]greement."[7] CP at 48. Hegyi also asserted that the trial court's initial class certification under CR 23(a) and (b), the method the parties used to calculate the proposed settlement amount, and class counsel's ability to receive compensation were inappropriate. Hegyi requested that the trial court reject the proposed settlement agreement in its entirety and set a hearing to address her objections.[8]

On June 30, 2008, the trial court issued its findings of fact and order approving the settlement agreement. It first stated that it had considered the settlement agreement, the prior proceedings, and "the materials submitted by the parties and objectors" concerning the settlement agreement. CP at 80. It then noted Hegyi's objections:

> [The Hegyis] object to just about every part of the Settlement. The Court, however, finds the settlement is fair and reasonable for the reasons set forth in this order. The [Hegyis'] objection is therefore overruled.

CP at 89-90.[9] On September 5, 2008, the trial court entered another order awarding fees and certifying the settlement approval order for appeal. Hegyi now appeals the trial court's ruling.[10]

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[7] Much like her arguments on appeal, Hegyi's objections below are ambiguous.

[8] In response, the Department asserted that Hegyi's objections were not "well-founded and in many instances reflect[ed] either a mis-reading or a misunderstanding of the scope of this litigation or the terms of the Settlement Agreement." CP at 148-49.

[9] The trial court's order listed only one other objector and stated that it would consider his objections at a separate hearing.

[10] Hegyi initially filed a notice of appeal on July 29, before the trial court's judgment became final on September 5. Her notice of appeal therefore became effective on September 6 under RAP 5.2(g).

ANALYSIS

I. Preliminary Issues

A. Hegyi's Arguments

As an initial matter, we note the following: Hegyi appears to raise three assignments of error and approximately twenty-nine "Issues Pertaining to Assignments of Error." Appellant's Br. at 2. Although she mentions CR 23 and chapter 41.40 RCW at various points throughout her opening brief, Hegyi fails to integrate the law and the facts in this case in a coherent or succinct manner. Rather, she presents us with a series of questions, none of which she attempts to answer. Furthermore, Hegyi often fails to cite to the record in this case.[11] Generally, without argument and citation to authority, we will not review an assignment of error. RAP 10.3(a)(6).

That Hegyi is acting pro se does not relieve her of the burden of providing us with adequate argument and citations. Pro se litigants are bound by the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997) (citing *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994)). Although it is not the Department's responsibility to clarify Hegyi's arguments for this court, its identification and discussion of the relevant issues are sufficient to allow review of the trial court's ruling in this case.

B. Class Certification Under CR 23(a) and (b)

At various points throughout her briefs, Hegyi cites to CR 23(a) and (b) and appears to assert that the trial court's initial class certification was improper. We review the trial court's

[11] Although the Department provides some citations to the record, it too fails to direct us to all relevant portions of the record.

class certification decision for an abuse of discretion. *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 167, 151 P.3d 1090 (2007) (citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995)). A trial court abuses it discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Weston*, 137 Wn. App. at 167-68 (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). Hegyi has failed to establish that the trial court abused its discretion by certifying the class in this case. The record demonstrates that the trial court carefully considered CR 23 (a) and (b) in making its determination.

C. Compromise Under CR 23(e)

Hegyi does not cite to CR 23(e) in her opening brief. She appears to argue, however, that the substance and/or adequacy of the notice provided to the class members before the trial court approved the settlement agreement were somehow deficient. The Department notes that CR 23(e)'s procedural requirements "Were Met and Exceeded" in this case. Resp't's Br. (Department) at 11. We agree with the Department's assertion that the parties complied with CR 23(e).

CR 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

"The requirements of CR 23(e) are for the most part procedural, requiring notice of a proposed settlement be given to class members and that [class members] be given an opportunity to object to the settlement." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d

351 (2001).

In this case, the Department mailed the class notice to 61,958 class members. Of those persons, 14,144 non-active class members also received a claim form with their notices. The notice explained how class members could object and submit comments regarding the settlement agreement and informed them of the settlement hearing's date and time. The Department subsequently sent follow-up mailings to class members whose notices were returned and to those who were required to return, but had not yet returned, claim forms for individual recovery. Additionally, the Department set up a telephone call center and posted settlement information on its website, which included a copy of the settlement agreement, the class notice, and the claim form, and a tool that allowed class members to calculate their estimated individual recovery amounts.

Hegyi fails to demonstrate that the Department's notices or its actions during the objection period did not conform to CR 23(e). Furthermore, she does not demonstrate that its notices or mailings did not provide adequate notice to the class members. We must therefore answer only one question: Did the trial court err by ruling that the parties' settlement agreement was fair, adequate, and reasonable? The record demonstrates that it did not.

II. Standard of Review

"Although CR 23 is silent in guiding trial courts in their review of class settlements, it is universally stated that a proposed class settlement may be approved by the trial court if it is determined to be 'fair, adequate, and reasonable.'" *Pickett*, 145 Wn.2d at 188 (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Corrugated Container*

Antitrust Litig., 643 F.2d 195, 207 (5th Cir. 1981); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977)). The criteria trial courts generally utilize to make this determination include: the likelihood of success by the plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. *Pickett*, 145 Wn.2d at 188-89 (citing 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11.43 *General Criteria for Settlement Approval* (3d Ed. 1992)).

The above list is not exhaustive, nor will each factor be relevant in every case. *Pickett*, 145 Wn.2d at 189 (citing *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Pickett*, 145 Wn.2d at 189 (quoting *Officers for Justice*, 688 F.2d at 625).

"It is not the trial court's duty, nor place, to make sure that every party is content with the settlement. Indeed, this would contravene the very nature of consensual settlements." *Pickett*, 145 Wn.2d at 189. Rather, the trial court should look to the possibility of inequitable treatment between class members. *Pickett*, 145 Wn.2d at 189. We "will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the [trial court] has abused its discretion." *Pickett*, 145 Wn.2d at 190 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 454-55 (2d Cir. 1974)).

We need only review findings of fact to which error has been assigned. Findings to which error has not been assigned are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Hegyi has not assigned error to any of the trial court's findings of fact; therefore, they are verities on appeal.

III. Settlement Agreement

The record demonstrates that the trial court did not abuse its discretion by ruling that the settlement agreement was fair, adequate, and reasonable and approving it. Hegyi's assertion (without citation to authority) that class counsel improperly received compensation for his representation of the class, for example, does not demonstrate that the trial court's finding was based on untenable grounds. Her other assertions regarding the fairness of the agreement similarly fail.

In this case, the trial court considered the following factors: (1) the likelihood of success by the plaintiffs; (2) the amount of discovery or evidence; (3) the settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, (7) the parties' compliance with its preliminary approval order; and (8) the number of objectors and nature of objections.

The trial court first considered the history of the litigation and noted that the parties agreed to the settlement in order to avoid the uncertainty, risks, delays, burdens, and costs of further litigation. The Department notes that, because a trial court would have been required to afford substantial deference to the Department's final order denying Probst's claim, there was substantial uncertainty as to whether the plaintiffs would have prevailed in this case. Both parties,

however, recognized that the outcome of continued litigation was uncertain and entered into settlement discussions. The trial court found that "[t]he great uncertainty the parties faced in how the Court would ultimately resolve [the] plaintiffs' claims is thus a factor that weighs heavily in favor" of finding that the settlement was fair, adequate, and reasonable. CP at 85.

The trial court then considered the recommendation of the "experienced . . . mediator" involved in the case and found that his recommendation that the parties settle on the terms contained in the settlement agreement was another factor indicating that the agreement was fair and reasonable. CP at 85. Additionally, the trial court considered class counsel's recommendation in favor of settlement and his belief that it was fair, adequate, and reasonable. When experienced and skilled class counsel supports a settlement, his/her views are given great weight. *Pickett*, 145 Wn.2d at 200 (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983)). That class counsel had worked on these claims for more than four years and that he was "knowledgeable about both the factual and legal issues, and the related risks" also supported a finding that the settlement was fair, adequate, and reasonable. CP at 86.

Furthermore, the trial court considered the settlement terms and conditions. After reviewing the class members' estimated total loss and the amount Probst pursued in relation to this loss, the trial court found that "[w]hether nearly all or half of the potential total recovery, due to the uncertainties and risks of further litigation, including potential recovery of nothing," the settlement was a fair and reasonable compromise of the plaintiffs' claims. CP at 86. "[T]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."

Pickett, 145 Wn.2d at 199 (quoting *City of Detroit*, 495 F.2d at 455. It also found that the claims form process for non-employee class members, the $15 claim floor,[12] and the class representative award were fair and reasonable, and that the parties had complied with the terms of the preliminary approval order. Finally, the trial court acknowledged that two parties had filed objections and ultimately overruled Hegyi's objections.

Hegyi seems to suggest that the trial court erred by failing to consider the presence of good faith and/or the absence of collusion, among other things.[13] Hegyi neither establishes that the trial court was required to consider these factors nor demonstrates the absence of good faith or presence of collusion in this case. Therefore, her argument fails.[14] The record demonstrates that the trial court considered a variety of factors before making its decision. The trial court's order approving the settlement agreement did not constitute an abuse of discretion and we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

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[12] The average claim of those falling beneath the $15 claim floor was $2.42.

[13] Hegyi appears to argue that class counsel did not act in good faith because they accepted compensation, were "selfish," and represented their own best interests. Appellant's Br. at 20.

[14] In addition to her arguments regarding the settlement agreement, Hegyi raises several issues regarding the Department's brief in her reply briefs. We granted Hegyi's motion to modify our commissioner's ruling initially rejecting these briefs in March 2009. However, her arguments neither address the substance of her appeal nor appear to affect the above analysis. Hegyi essentially argues that the Department's failure to respond to each of her arguments violated RAP 10.3(b). She also argues that class counsel should be listed as a respondent in this case. None of her arguments has merit.

Van Deren, C.J.

Bridgewater, J.